INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	8
Conclusion	12

CITATIONS

Cases:

Adams v. *United States*, 317 U.S. 269	8
Darcy v. *Handy*, 351 U.S. 454	8
Kolod v. *United States*, 390 U.S. 136	11
Nardone v. *United States*, 308 U.S. 338	9
O'Brien v. *United States*, 386 U.S. 345	10
Sanders v. *United States*, 373 U.S. 1	12
Taylor v. *United States*, 229 F. 2d 826, certiorari denied, 351 U.S. 986	9

322-921—68

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 546

JAMES R. HOFFA, THOMAS EWING PARKS AND LARRY CAMPBELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 398 F. 2d 291. The opinion of the district court (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1968. On August 12, 1968, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to September 21, 1968, and the petition was filed on September 20, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on the date set for an evidentiary hearing on petitioners' fourth motion for a new trial filed three months before, the court properly denied requests for a ninety-day continuance or non-prejudicial dismissal of the motion, sought on defense counsels' unelaborated statement that certain information had come to their attention which would make it improper to proceed.

2. Whether the trial court properly excluded from the scope of the proposed evidentiary hearing various matters as to which petitioners failed to allege facts which could support a motion for a new trial.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Tennessee in 1964, petitioners were convicted of jury tampering in connection with a 1962 criminal case against petitioner Hoffa. The court of appeals affirmed (349 F. 2d 20), as did this Court in December 1966 (385 U.S. 293). The present petition involves the fourth motion for a new trial filed by petitioners in connection with this case.[1]

[1] The first motion for a new trial, made immediately after the verdict (the denial of which was reviewed with the main appeal), set forth numerous alleged errors, including alleged misconduct of the jury. The second motion, filed in December 1964, while the main case was pending in the court of appeals, alleged denial of Sixth Amendment rights in the investigation of the case. The denial of this motion was affirmed: 376 F. 2d 1020, certiorari denied, 389 U.S. 859. The third motion, filed shortly after affirmance of the main case on appeal, alleged misconduct of the jurors and trial judge and also sought dis-

Subsequent to the affirmance of petitioners' convictions by this Court, they filed a motion here, supported by affidavits, alleging that they were entitled to have the judgment set aside by reason of claimed governmental electronic eavesdropping, wiretapping, and other intrusions. Following the government's response, this Court denied the motion on February 27, 1967 (386 U.S. 940), and, on the same day, denied rehearing of the case (386 U.S. 951). The next day petitioners filed in the district court the instant motion for a new trial, making the same allegations as in this Court with respect to wiretapping and electronic eavesdropping. The district court determined that the motion raised issues of fact and ordered an evidentiary hearing (App. 183a).[2] At petitioners' request, this hearing was set for May 8, 1967 (App. 188a), although the government asked for an earlier date (App. 248a).[3] The court indicated that the hearing would embrace "all issues of fact raised by the pending motion for new trial and any amendment thereto or that may be defined by further orders of the Court" and gave petitioners the opportunity to amend their motion by April 3, 1967, to include "any and all other matters of which they have knowledge that might

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qualification of the trial judge to hear the motion, based upon his alleged remarks to a prostitute. The denial of this motion was affirmed. 382 F.2d 856; certiorari denied, 390 U.S. 924.

[2] "App." refers to petitioners' appendix in the court below, containing substantial excerpts from the relevant proceedings. We are lodging a copy of this appendix with the Clerk of this Court.

[3] The hearing was later continued one day at the government's request (App. 232a).

affect the validity of the criminal judgment and their respective sentences herein" (App. 187a–188a).[4]

A pretrial conference was held on April 21, 1967, to define the issues for the hearing (App. 188a). The court ruled (App. 240a) that it would receive evidence on the issues raised by the following affidavits filed by petitioners, which were contested by affidavits filed by the government.

1. An affidavit of one Benjamin Nichols, who alleged that shortly before the trial began he personally installed electronic eavesdropping devices in the Chattanooga hotel suite occupied by petitioner Hoffa and his attorneys, tapped the telephones in the same suite, and then kept himself available in Chattanooga to service these devices during the trial. Nichols said that these activities were accomplished at the direction of Walter Sheridan, then a Special Consultant to the Attorney General of the United States (App. 37a–42a, 35a–36a).[5]

2. Affidavits of Herman Frazier, Alfred Paden, Albert Cole and Hazel Fulton, all of whom alleged that, during the government's investigation of the case, Walter Sheridan had played to them tape recordings of conversations between petitioner Hoffa and his attorneys (App. 61a, 66a, 67a, 70a, 72a, 101a, 102a).

3. Affidavits of William Loeb and I. Irving Davidson, who claimed that they were told by Cartha De-

[4] An amendment to the motion was filed on that day (App. 189a).

[5] Nichols also claimed that shortly before the trial he installed similar devices on the tenth floor of the Read House Hotel in Chattanooga, where the jury was sequestered during the trial (App. 39a, 198a).

Loach (Assistant Director of the Federal Bureau of Investigation), and John J. Hooker, Sr. (one of the prosecutors), that the government had wiretapped petitioner Hoffa (App. 56a, 52a).

The court also ruled that the following materials filed by petitioners presented no factual issues which could bear on the instant trial (App. 241a):

1. An affidavit by Paul Quaglia that, in late 1962 and in 1963, while employed by the Detroit Police, he had monitored a wiretap on the telephone of William E. Bufalino, an attorney for Hoffa, and had overheard Bufalino telling his wife about strategy involving Hoffa (App. 83a–85a). Quaglia stated that he "was under the belief that these wiretaps were for the Federal Government." The court held that this expression of opinion, unsupported by any allegation of fact, failed to establish any involvement of the federal government (App. 241a).

2. Allegations of eavesdropping prior to the commission of any offense by any defendant (App. 242a). This ruling referred to an affidavit by Bufalino that in November 1961, an electronic transmitter was found in the Florida hotel room of James Haggerty, Sr., an attorney for petitioner Hoffa, while Bufalino and Haggerty were discussing a pending federal case against Hoffa in Florida.

3. Allegations concerning the fact that the Solicitor General had revealed to the Supreme Court that Charles O. Brien, convicted of a customs violation in Detroit, had been overheard once talking about his own case and a second time with his attorney regarding the territorial conditions of his bond (App. 119a–

121a). An affidavit of Bufalino alleged that this conversation was with an attorney who was one of Hoffa's lawyers (App. 108a). The court noted that there was "a total absence of any allegation of facts" which would relate such recordings to any defendant in the instant case (App. 242a).

On the morning of May 9, 1967, before the hearing was to begin, the parties met in chambers at the request of petitioners' counsel. At that time, they made the following statement (App. 247a):

> Mr. SHENKER: We called this conference or requested this conference for the following reasons:
>
> Within the last several days certain information has come to us, to our attention. This information is of such a nature that we feel that it would be improper for us to proceed with our motion at this time, with the motion that is pending.
>
> I have communicated this information to my client, Mr. James R. Hoffa, and am authorized on his behalf, with all of the other defendants joining, and counsel for all of the other defendants agree, to ask this Court that this matter be continued for a period of 90 days.
>
> Counsel and the defendants feel that to proceed without being fully informed on the matters that were brought to our attention within the last few days would be most improper.

When the District Court told petitioners' counsel that, on the state of the record, it could "see no basis for granting a motion for continuance" petitioners' counsel stated, "[w]e cannot proceed." He then made no further disclosure to the court (App. 248a). The

court then adjourned the conference and the case was called in open court (App. 253a). At that time, the motion for continuance was renewed (App. 255). The court said that since "the nature of that motion is not in any way disclosed" the motion would be denied (App. 258a). Petitioners' counsel then asked the court to dismiss the motion without prejudice, "giving the same reasons that we have given for the motion for continuance" (App. 258a).

In overruling this motion, the court noted, "[t]his matter has been pending now for several months and the hearing date set for today was the date which was requested by counsel for the defendants after the court had suggested an earlier date" (App. 261a). Petitioners were then asked to proceed with their evidence, but they refused (App. 261a). Their counsel stated that if certain of the information which they had received were verified, portions of the instant motion might be withdrawn (App. 264a). The court stated that it saw no reason why petitioners "should not proceed with the other phases of the case" (App. 265a). Petitioners, however, declined to produce any evidence on any aspect of their motion.

On May 10, 1967, the court denied petitioners' motion for a new trial with prejudice, stating (App. 276a):

> The action of counsel for the defendants in declining to call the witness when afforded the opportunity to do so would reasonably indicate to the Court that such counsel may have learned of matters in their preparation for the hearing which caused them to be unwilling to further assert or vouch for the truth of the matters set

forth in the affidavits filed in support of the motion. Should this be the case, while it would be commendable for counsel to decline presenting matters unto the Court as true when in fact they have no belief in the truth of the matters, it would likewise be regrettable that the investigation leading to this conclusion was not undertaken and completed prior to the filing of the affidavits in the United States Supreme Court and in this court.

ARGUMENT

1. The trial judge acted well within his discretion in refusing to grant a ninety-day continuance or to dismiss petitioners' motion without prejudice. Petitioners not only failed to disclose the nature of the information which they represented had come to their attention, but also declined to reveal the circumstances which forbade such disclosure. Petitioners clearly had the burden of establishing their right to a new trial. See *Adams* v. *United States,* 317 U.S. 269, 281; *Darcy v. Handy,* 351 U.S. 454, 462. Having been offered ample opportunity to present their evidence and having refused to do so, there was no reason for the court to grant petitioners a lengthy continuance or to allow the motion to be dismissed without prejudice.

2. Nothwithstanding the fact that they refused to introduce any evidence at the hearing, petitioners argue that the trial court erred in excluding certain matters alleged in their motion from the scope of the proposed hearing. As the court of appeals held, however (Pet. App. A, 17), the matters stricken were on their face insufficient to require the taking of testimony.

a. The claimed electronic eavesdropping involving James Haggerty's Florida hotel suite was alleged to have been discovered in 1961, long prior to the offense charged in the instant indictment. Thus, it could not affect the present case. Moreover, it was obviously not "newly discovered". In addition, at no time has any contention been made that the alleged device was installed or maintained by the federal government.

b. There was no factual allegation that the federal government had any connection with the alleged wiretapping of William Bufalino's telephone by the Detroit Police Department. Affiant Quaglia's stated "belief" that the city was acting for federal authorities lacks any factual support. There was thus nothing which would warrant a hearing. *Nardone* v. *United States,* 308 U.S. 338; cf. *Taylor* v. *United States,* 229 F. 2d 826, 832 (C.A. 8), certiorari denied, 351 U.S. 986.

c. The government's disclosure in *O'Brien* v. *United States,* 386 U.S. 345, that two conversations of Charles O'Brien had been overheard by the F.B.I. on an electronic device could not possibly have had any effect on petitioners' convictions. As previously indicated by the government (see *O'Brien, supra,* at pp. 345–346), the conversations dealt with O'Brien's forthcoming trial for a customs violation and the conditions of his release on bail and thus were utterly irrelevant to the present charge.

3. As noted above, the allegations contained in petitioners' present motion for a new trial and the affidavits filed in support thereof are virtually identical

to those set forth in the "Motion for Relief Because of Wiretapping, Electronic Eavesdropping and Other Intrusion" filed by petitioners in this Court shortly after the Court affirmed their convictions. At that time we advised the Court that we had investigated this matter and determined that petitioners' allegations "that there was electronic eavesdropping or wiretapping by agents of the federal government (or at their request) on petitioners' premises or telephones, on the premises or telephones of their attorneys, or on the premises occupied or the telephones used by the jury, are without foundation in fact." Memorandum for the United States in Opposition to Petitioners' "Motion for Relief." *Hoffa* v. *United States,* No. 32, Oct. 1966, p. 9. When the present motion was made in the district court, the government supported the above statement by submitting affidavits which contradicted all of the material allegations contained in the affidavits submitted by petitioners (App. 122a–170a).

In our opposition to petitioners' motion for relief we also advised the Court that pursuant to the policy set forth in our Supplemental Memorandum in *Schipani* v. *United States,* No. 504, O.T. 1966, p. 8, we had reviewed our files in these cases and our "inquiry has produced no information lending any support whatever to a claim that electronic eavesdropping or wiretapping affected petitioners' convictions."

That review had been conducted pursuant to the policy of the Department of Justice which was set forth in the Memorandum for the United States in Opposition to the Petition for Rehearing From the Denial of the Writ of Certiorari in *Kolod* v. *United*

States, No. 133, O.T. 1967, to disclose the fact that a defendant had been overheard if the overheard conversations were arguably relevant to the prosecution. Since that time, however, this Court has ruled that the government cannot determine for itself whether or not the overhearing of a defendant's conversations may have affected his case. *Kolod* v. *United States,* 390 U.S. 136.

In light of this Court's decision in *Kolod,* we wish to disclose to the Court that, although none of these petitioners was ever the subject of illegal electronic surveillance directed against him, two of the petitioners did participate in conversations which were monitored during the course of electronic surveillances directed against others.

The overheard conversations were unrelated to the prosecution of petitioners and have no bearing on the issues raised in the motion for a new trial presently before the Court. The conversations are in no way related to the allegations which petitioners made in their motion, neither to the allegations which the court found insufficient on their face, nor to the allegations which petitioners declined to attempt to prove. The government has planned to and will make a full disclosure to the district court in accordance with the procedure which this Court prescribes in *Alderman* v. *United States* (the new caption of *Kolod, supra*), pending on the government's motion to modify. If, following the government's disclosure, petitioners believe there is a basis for a further motion for collateral relief, they are not precluded from filing such a motion in the

district court. See *Sanders* v. *United States*, 373 U.S. 1. It is therefore appropriate for the Court to rule on the petition for a writ of certiorari in respect to the particular issues which are presented by this record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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